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No. 04-340

In the

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, and T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Is a Fifth Amendment Takings claim brought in federal court barred by issue preclusion based on a state court judgment denying compensation under state takings law?

2. May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

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INTEREST OF AMICI CURIAE[1]

For more than 30 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every other major real property takings case heard by this Court in the past three decades.

PLF previously participated as amicus curiae in this case and the related state court case. PLF filed amicus briefs in support of San Remo Hotel, L.P., Thomas Field, Robert Field, and T&R Investment Corp. (Petitioners herein) before the Ninth Circuit Court of Appeals, the United States District Court for the Northern District of California, the California Supreme Court, and the California Court of Appeal.

Amicus National Association of Realtors (NAR) is a nonprofit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. A letter evidencing such consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity. The National Association of Realtors has participated as amicus curiae in numerous property rights cases before this Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

This case raises important issues of constitutional law. Amici file this brief to assist the Court in considering the conditions under which property owners may present their claims for recovery of compensation for harm to private property under the Fifth and Fourteenth Amendments to the United States Constitution in a federal forum.

Specifically, PLF and NAR argue that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), must not be interpreted to deny federal takings claims in federal courts. Amici also argue that the manner by which an exaction is imposed cannot determine the applicable constitutional test. PLF and NAR believe that their public policy perspective and litigation experience provides an additional viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The San Remo Hotel is a family owned and operated hotel located in the North Beach section of San Francisco (City). Since at least 1971, the San Remo has been operated as a tourist hotel. In 1979, the City imposed a moratorium on the demolition or conversion of hotel rooms classified by the City as "residential." This moratorium became a permanent prohibition in 1981, when the City adopted the initial version of

its Residential Hotel Unit Conversion and Demolition Ordinance (HCO). *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 91-92 (Cal. 2002), Appendix (App.) at 108a-109a. The current version of the HCO was enacted in 1990. The HCO seeks to alleviate the "adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." *Id.*

Prior to the HCO, the City did not make distinctions between residential hotels which house long-term tenants, and commercial hotels that provide overnight accommodations for tourists. The City now applies the HCO to make such distinctions on a room-by-room basis within individual structures. The 1981 ordinance required hotel operators to submit a report documenting the number of tourist and residential units in their hotels as of September 23, 1979. Since then, the HCO has kept this distribution frozen.

Under the HCO, any "conversion" of rooms from residential to any other use is forbidden without a permit from the City. As a prerequisite to obtaining a conversion permit, the hotel owner must either dedicate an equivalent amount of housing to the City or pay an "in lieu" fee equal to the cost of site acquisition plus 40% (since 1990, 80%) of the cost of constructing an equivalent number of affordable housing units.

Shortly before the effective date of the 1990 HCO, the owners of the San Remo applied for a permit to "convert" their hotel to full tourist use. To this end, the City Planning Commission granted a conditional use permit for the San Remo, subject to a requirement that the owners make a cash payment of $567,000 to the City pursuant to the HCO. This fee was paid under protest, and the San Remo challenged the City's exaction in federal court, arguing that the exaction is a

regulatory taking in violation of the Fifth Amendment to the United States Constitution.

San Remo's petition includes a detailed summary of the procedural history of its takings claims. Petition at 4-6. Briefly, the federal court sent San Remo to the California state courts to ripen its takings claims pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172. The California Supreme Court denied San Remo's state takings claims. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088, 1093 (9th Cir. 2004), App. at 9a-11a. Then, San Remo returned to the federal courts to litigate its federal takings claims. San Remo lost again. The Ninth Circuit affirmed the district court's ruling that San Remo was barred from litigating its federal takings claims in federal court, because "the California Supreme Court's adjudication of the state takings claims was an 'equivalent determination' of the federal takings claims." *Id.* at 1090, App. at 4a. The Ninth Circuit concluded that neither federal takings law, nor California takings law, applies a "rough proportionality" standard to legislatively imposed exactions. *Id.* at 1097-99, App. at 17a-21a.

SUMMARY OF ARGUMENT

Petitioners in this case are not the first to be caught in the *Williamson County* "trap."[2] The ripeness requirements of *Williamson County* regularly are applied to preclude property owners from bringing federal takings claims in federal courts. That cannot be what this Court intended; *Williamson County* itself holds out the promise of federal adjudication of federal takings claims. And in *England v. Louisiana State Board of*

[2] *See* Michael M. Berger, *Ripeness: Historical Derivation and Lingering Dysfunction*, SE45 ALI-ABA 461, 467 (2000) (The interplay between *Williamson County* and the rules of res judicata and collateral estoppel "can be worse than chaos; in many cases, it's a trap.").

Medical Examiners, 375 U.S. 411 (1964), this Court emphasized the importance of allowing litigants to have their federal claims decided in the federal courts. It is just as important to the development of the law. The federal courts are precluded from defining the contours of federal takings law when federal takings claims are relegated to the state courts.

The California Supreme Court is one of the state courts that uses two separate standards of review to takings challenges involving development exactions. The "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is applied when an exaction is imposed adjudicatively, and a rational basis standard is applied to legislatively imposed exactions. The California Supreme Court, and other state courts that follow its example, are wrong to rely on a legislative-adjudicative distinction to determine the appropriate standard of review. The government is just as likely—perhaps more likely—to impose extortionate exactions through legislation of general applicability. The difficulty of distinguishing which local government actions are legislative and which are adjudicative only adds to the confusion and inconsistency exhibited by the lower courts on this issue. The "rough proportionality standard" must be applied to all development exactions, regardless of how they are imposed; it is the only way to assure that property owners receive the protections guaranteed by the Takings Clause.

ARGUMENT

I

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, AS APPLIED BY LOWER COURTS, GIVES TO STATE COURTS THE TASK OF DEVELOPING FEDERAL TAKINGS LAW

The property owners in this case find themselves in a perplexing situation. San Remo was forced to ripen its Fifth Amendment federal regulatory takings claims by seeking compensation in state court. Then San Remo's federal takings claims were dismissed because the district court found that the process of ripening the federal claims extinguished them. Federal takings claims are routinely dismissed as unripe when first litigated in federal court.[3] *See* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 234-36 (1999), which includes testimony of Daniel R. Mandelker[4] before the House Judiciary Committee Subcommittee on Courts and Intellectual Property. Professor Mandelker expressed his opinion that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." *Id.* at 236.

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[3] *See, e.g., Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir.), *cert. denied*, 537 U.S. 973 (2002); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998).

[4] Professor of law at the University of Washington in St. Louis, Missouri, and a prolific author on the law of zoning and land use planning.

The importance of this problem cannot be overstated. Professor Steven J. Eagle described the "notion of 'ripeness' " as "the greatest barrier to the protection of property rights." *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) [Available on Westlaw, 1997 WL 626959 (F.D.C.H.)] (Statement of Steven J. Eagle, Professor of Law, George Mason University School of Law). [5]

A. The *Williamson County* Ripeness Requirements Must Not Preclude Litigation of Federal Takings Claims from the Federal Trial and Appellate Courts

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 195, this Court established a test for determining if a takings case is ready to be heard in federal court. First, administrative action must be final,[6] and second, a plaintiff must have sought "compensation through the procedures provided by the State." *Id.* Only the second requirement is relevant to the instant case. And as to that requirement, this Court explained as follows:

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[5] Professor Eagle emphasized that he was not referring to the

> normal requirements that a matter involves a case or controversy over which the court has jurisdiction or the normal prudential requirements. Rather, the Supreme Court has developed "a special ripeness doctrine applicable only to constitutional property rights claims." Timothy V. Kassouni, "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," 29 Cal. W. Rev. 1, 2 (1992).

Id.

[6] "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." *Id.* at 193.

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation *before* bringing a § 1983 action.

Id. at 195 n.13.

Two years later, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court said that the state courts must provide adequate procedures for recovery of just compensation when government takes private property. *Williamson County* and *First English*, read together, require that property owners seek and be denied compensation in state court before bringing a federal takings claim in federal court. That said, this Court has not explained how the lower federal courts should resolve the issue preclusion and claim preclusion questions that can arise when property owners seek to ripen their federal takings claims in state court as required by *Williamson County*.

What should be clear is that the very steps necessary to ripen a federal takings claim should not serve to bar that claim. This Court's language holds out the promise of federal adjudication of a federal takings claim. In *Williamson County*, this Court explained that the takings claim was *premature* (*see, e.g.*, *Williamson County*, 473 U.S. at 185, 187, 194, 196) and not ripe (*see, e.g.*, *id.* at 186, 194).

> Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that land use cases *can* be ripened and *then* litigated in federal court.

Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 104 (2000) (emphasis added).

In another context, habeas corpus review, this Court explained that construing a law as ceding authority to interpret federal law to the states would be an important change in the Court's jurisdiction, requiring a clear intent on the part of Congress to do so. *Williams v. Taylor*, 529 U.S. 362, 379 (2000). Amici urge this Court to review this case and open the doors of the federal courthouse to those with federal takings claims.[7]

B. Federal Courts Must Define the Contours of Federal Takings Law; That Responsibility Cannot Be Left to the State Courts

When takings claims ripened through state procedures are precluded from resolution in the federal courts by claim or issue preclusion, the federal courts do not contribute to the development of the law pertaining to Fifth Amendment takings. State courts will decide when compensation is appropriate and how it should be measured (*see* George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465, 475 (2000)), and the only remaining federal court review is direct review by this Court (*see id.* at 466). Some commentators suggest that is acceptable,[8] but this Court

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[7] *See* Berger, *Supreme Bait & Switch*, *supra*, at 122 ("Once property owners submit their claims to state courts, their risk of never seeing the inside of a federal courthouse is high.").

[8] *E.g.*, Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman*, and Res Judicata*, 31 Envtl. L. Rev. 10353, 10354 (2001); Kathryn E. Kovacs, *Accepting the Relegation of Takings*

(continued...)

disagreed in *England v. Louisiana State Board of Medical Examiners*. In *England*, this Court said that appellate review by the High Court does not provide adequate recourse to those who want to litigate federal claims in federal court.

> It is true that, after a postabstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review . . . is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. There is always in litigation a margin of error, representing error in factfinding . . . . Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

375 U.S. at 416-17 (internal quotations, citations, and footnote omitted).

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[8] (...continued)
Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County, 26 Ecology L.Q. 1, 34-47 (1999).

England is an abstention case, not a takings case, but this Court's words are equally relevant to Fifth Amendment takings cases.

> [A]s the Court acknowledged in abstention cases, it now seems necessary, as the lowest level of protection affordable to Fifth Amendment property rights, for the Court to acknowledge that in the unique class of land use ripeness cases a trial in state court may be a precondition designed to weed out the cases where relief is granted by state law. Obtaining state court relief may moot the federal issue, but unsuccessful state court litigation "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

Berger, *Supreme Bait & Switch*, *supra*, at 129-30 (quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 417). *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1270 (2004) (Preclusion law should provide no more of an obstacle when litigating a takings claim than it did in *England* itself.).

Far more is involved than a plaintiff's desire to litigate his or her case in federal court: an interpretation of *Williamson County* that cuts lower federal courts out of federal takings cases ignores the distinct roles of the Federal Constitution and state constitutions. The United States Constitution "prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). State constitutions can provide protections for civil liberties that are more expansive than those provided by the United States Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Amici PLF and National Association of Realtors urge this Court to act now so that the

lower federal courts can set the floor for and define the contours of federal takings law.

II

APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON THE METHOD BY WHICH EXACTIONS ARE IMPOSED

As Petitioner and Amicus National Association of Home Builders (NAHB) ably describe, there is a nationwide split of authority on the question of whether the heightened standard of judicial scrutiny articulated in *Dolan v. City of Tigard*, 512 U.S. 374, applies to legislatively adopted exactions. *See* petition at 11-12; and amicus curiae brief of NAHB. In California, the "rough proportionality" standard of scrutiny described in *Dolan* does not apply to legislatively imposed exactions. The California Supreme Court adopted a bright-line test: the *Dolan* standard of scrutiny applies to exactions imposed on an individual and discretionary basis, and a rational basis standard applies to generally applicable, legislatively formulated exactions. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996).[9]

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[9] *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d at 104-05, App. at 139a ("[A] housing fee . . . assessed under the [San Francisco ordinance] stands in sharp contrast to the recreational facilities replacement fee we found subject to heightened scrutiny in *Ehrlich*."); *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1002 (Cal. 1999) (The standard of scrutiny in *Nollan* and *Dolan* do not apply. "[A] different standard of scrutiny would apply to development fees that are generally applicable through legislative action."); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1198-99 (Cal.), *cert. denied*, 525 U.S. 876 (1998) (A more deferential standard of judicial review is appropriate in this case where neither conveyances (continued...)

A. The Risk of Government Extortion Does Not Disappear When Exactions Are Imposed Legislatively

In *Ehrlich*, the California Supreme Court opined that heightened scrutiny is not required when analyzing the constitutionality of legislatively formulated exactions, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444. Other state courts followed suit. *See, e.g., Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (*Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions."); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 696 (Colo. 2001) ("One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system."); and *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) ("The California court suggested that the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land.").

The fact is that the risk of government extortion does not disappear when exactions are imposed by legislation of general applicability. *See* Inna Reznik, *The Distinction Between*

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[9] (...continued)
nor individualized development fees are at issue.); and *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 867 (Cal. 1997), *cert. denied*, 522 U.S. 1077 (1998) (*Nollan* and *Dolan* do not apply because "rent control neither requires a physical dedication nor amounts to an individual and discretionary development fee.") *Id.* at 868 n.1 (Mosk, J., concurring).

Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context.") *Id.* at 267. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. *See* Reznik, *supra*, at 270-72. Those types of programs do not allow government to consider widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories.

B. The Political Process Provides Inadequate Protection from Extortionate Exactions

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105, App. at 141a. *See Rogers Machinery, Inc. v.*

Washington County, 45 P.3d at 982, wherein the Oregon Court of Appeals cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. The cost of development exactions is invisible to the majority of voters, and developers are subject to the kind of majoritarian oppression that affects seriously outnumbered groups. *See* Reznik, *supra*, at 271-72; and William A. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

C. The Legislative-Adjudicative Distinction Creates Great Uncertainty

The legislative-adjudicative distinction is not a viable means for determining whether or not to apply *Dolan*'s "rough proportionality" standard because it is difficult to pigeonhole local government action as legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, and commonly combine these functions in land use decisionmaking. *See* Reznik, *supra*, at 257-61. *See also* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a *Dolan* analysis is apt to be open-ended and chronic.").

Inna Reznik authored the most comprehensive article on the problems encountered when differentiating between legislative and adjudicative decisions in land use cases. *See* Reznik, *supra*. In the article, Ms. Reznik describes the results of a survey of 29 cases. She put each case into one of three

categories: (1) scheduled exactions (where an amount of money or land was specified in advance by a legislative body); (2) negotiated (authorized by a legislative body but individually determined in response to a specific development proposal); or (3) not clear. *Id.* at 252. The results show a great deal of confusion among the courts, and an inconsistent application of the legislative-adjudicative distinction.

Of the cases involving exactions that were scheduled by the legislative body (those closest to legislative decisions), just as many courts applied *Dolan*'s "rough proportionality" test as refused to apply it because of the belief that *Dolan* applies only to adjudicative decisions. Reznik, *supra*, at 254. In challenges to negotiated exactions (those closest to adjudicative decisions), five out of nine applied *Dolan*'s "rough proportionality" standard. *Id.* at 255. And finally, in nine cases where the court did not clarify the nature of the exaction, eight out of nine applied the "rough proportionality" standard. *Id.* at 256.

The artificial distinction between fees imposed by legislative acts and those imposed by quasi-adjudicative acts creates uncertainty among the courts, property owners, and local governments. All would benefit from a manageable and predictable test.

D. The Bright-Line Test Adopted by the California Supreme Court, and Followed by a Number of Other State Courts, Does Not Further the Purpose of the Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The

nexus and rough proportionality requirements ensure that the purpose of the Fifth Amendment is fulfilled by protecting property owners from government actions that impact arbitrarily and unevenly on isolated individuals. *See* James L. Huffman, *Colloquium on* Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

The nexus and rough proportionality tests of *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan* were adopted for the express purpose of preventing government from taking advantage of property owners seeking permits to develop or otherwise use private property. In *Nollan*, this Court used the now-famous phrase "'an out-and-out plan of extortion'" to describe the California Coastal Commission's attempt to take private property without paying just compensation. *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). *See Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, Kennedy, & Thomas, JJ., dissenting to denial of certiorari) ("The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process '"an out-and-out plan of extortion."' "). (Citations omitted.)

Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative-adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative-adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property

rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999) (Land development conditions require a legitimate state interest, nexus, and proportionality. "These rules extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless.").

Legislatively imposed exactions have become an increasingly popular method of funding local projects, and the distinction between exactions imposed by legislative acts and those imposed by quasi-adjudicative acts does not further the Takings Clause's substantive protection of private property.

CONCLUSION

This Court phrased the *Williamson County* prerequisites to federal takings litigation in terms of ripeness. The ripeness inquiry in a takings claim involves a determination that a property owner has exhausted all avenues for obtaining compensation.[10] The ripeness requirements cannot and should not extinguish the opportunity to litigate in federal court. As the Second Circuit Court of Appeals recently noted, such a result "would be both ironic and unfair." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d

[10] Laurence H. Tribe, *American Constitutional Law* 337 (3d ed. 2000).

Cir. 2003), *cert. denied*, No. 04-142, 2004 WL 2071528 (Oct. 4, 2004).

Equally unfair are the grossly excessive development exactions that result when courts refuse to apply the "rough proportionality" standard required by this Court in *Dolan v. City of Tigard*. The standard of review in a constitutional takings claim must not depend on arbitrary and ill-defined distinctions like the manner by which an exaction is imposed.

Amici Pacific Legal Foundation and National Association of Realtors respectfully request that this Court grant certiorari to resolve the important issues raised by the Ninth Circuit Court's decision in this case.

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Respectfully submitted,

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